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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

GEORGE F. GARNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE P. GARNER, Pro se.
P.O. Box 1000
Marion, Illinois 62959

BY:

LARRY E. STEAD, Director
Prisoners Legal Assistance Project

P.O. Box 1000 #93699-131
Marion, Illinois 62959

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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari will issue to review the judgment and final decision of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 20, 1976.

OPINIONS BELOW

The Orders of the District Court are unreported and are set forth in the Appendix attached hereto at pages A-1 (Civil No. 8488, dated May 10th, 1974); A-2 through A-4 (Civil No. 8488, dated June 28, 1974); A-5 (Civil No. 8488, dated July 17, 1974); A-9 through A-11 (Civil No. 3-74-337, dated March 25, 1975); A-12 through A-14 (Civil No. 8488, dated March 25, 1975); A-15 through A-16 (Civil No. 8488, dated March 25, 1975); and, A-17 (Civil No. 8488, dated April 18, 1975). The Opinion and Orders of the United States Court of Appeals for the Sixth Circuit are unreported and are set forth in the Appendix attached hereto at pages A-6 through A-7 (Appeal NO. 74-1953, dated January 8, 1975); A-8 (Appeal No. 74-1953, dated

January 24, 1975); and, A-18 through A-24 (Appeal No's 75-1813 and 75-1814, dated July 23, 1976). The Order of the Sixth Circuit denying a rehearing and rehearing en banc is not reported and is set forth herein at page A-25 (Appeal No's 74-1953; 75-1813; and 75-1814, dated October 20, 1976) of the Appendix attached hereto.

JURISDICTION

The Opinion and Decision of the Sixth Circuit Court of Appeals affirming the District Court's "summary dismissals" of petitioner's motions to vacate was entered on July 23, 1976. A timely motion for rehearing and rehearing en banc was filed and denied by the Court below on October 20, 1976. Jurisdiction of this Honorable Court is presently invoked pursuant to 28 U.S. Code, § 1254(1).

QUESTIONS PRESENTED

I Whether or not an indictment must contain every essential element necessary to constitute guilt of the crime charged before either a conviction or sentence can be had or imposed thereunder?

Russell v. United States, 369 U.S. 749 (1961)
Burton v. United States, 202 U.S. 344 (1906)

II Whether Title 18 U.S. Code, §§ 924 (b) and (c)(2), create specific "crimes", requiring the essential elements of proof of each to be alleged in the indictment and decided by a jury, or merely provides for "summary enhancement" of punishment for the commission of other crimes?

Gun Control Act of 1968, Pub. L. 90-618
Legislative History, House Report No. 1577

III Whether a defendant who is indicted, tried, and convicted of "transporting" firearms and ammunition in interstate only, in violation of 18 U.S. Code, §§ 922(g) and 924(a), can be punished in excess of the statutory maximum provided for such illegal transportation upon mere allegations of additional criminal acts not charged in the indictment?

Williams v. New York, 337 U.S. 241 (1949)
Yates v. United States, 356 U.S. 363 (1958)

IV Whether a sentence imposed under an indefinite and unascertainable penalty provision other than, and in excess of, that specifically provided for by the Congress as punishment for the acts charged in the indictment renders the entire sentencing proceedings void and lacking in due process of law?

Townsend v. Burke, 334 U.S. 736 (1948)
United States v. Daugherty, 269 U.S. 360 (1926)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The instant petition involves the Fifth and Sixth Amendments to the Constitution of the United States, and Title 18 U.S. Code, §§ 922(g), 924 (a)(b) and (c). The pertinent texts of which are set forth as follows:

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . , nor be deprived of life, liberty, or property, without due process of law; . . ."

SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . ."

TITLE 18 UNITED STATES CODE:

Section 922:

"(g) It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport any firearm or ammunition in interstate or foreign commerce."

Section 924:

"(a) Whoever violates any provision of this Chapter . . . shall be fined not more than \$5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine."

"(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, . . . ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined not more than \$10,000, or imprisoned not more than ten years, or both."

"(c) Whoever—

(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States,

or,

(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,

shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years."

(Emphasis Added)

STATEMENT OF THE CASE

On March 19, 1970, petitioner was indicted by the federal Grand Jury in Greenville, Tennessee, in three separate indictments. Count I of indictment No. 17, 725 charged an ex-convicts possession of a firearm, a violation of 18 U.S. Code, Appendix, § 1202(a). Count II of the same indictment charged petitioner with knowingly "transporting and shipping certain firearms and ammunition in interstate from the state of Florida to the state of Tennessee, a violation of 18 U.S. Code, §§ 922(g) and 924(a).

The second indictment, No. 17,726, charged petitioner in a single Count with possessing firearms and other destructive devices that had not been registered as required by law, a violation of 26 U.S. Code, §§ 5861(d) and 5871.

Count I of the third indictment, No. 17,727, charged petitioner with possessing certain stolen postal money orders with intent to convert the same to his use, a violation of 18 U.S. Code, § 641. Count II of that same indictment charged possession of the same postal money orders with intent to defraud, knowing the same to have been falsely made, forged, counterfieted or altered, a violation of 18 U.S. Code, § 472.

Petitioner was afforded a single trial on all charges before a jury on December 23, 1970, and a verdict of guilty was rendered by said jury on all Counts of each indictment.

On January 29, 1971 petitioner appeared before the Honorable Robert L. Taylor, Judge, for sentencing. He was sentenced to the custody of the Attorney General for a period of two (2) years under Count I and ten (10) years under Count II of indictment No. 17, 725, said terms to be served consecutively. An eight (8) year term was imposed under

indictment No. 17,726, and ordered to be served consecutively to the term imposed in No. 17, 725. Petitioner was thereafter ordered to serve two concurrent ten (10) year terms under Counts I and II of indictment No. 17,727, and the said terms were ordered to be served concurrently with the sentences previously imposed, for an aggregated term of twenty (20) years.

A direct appeal was taken to the Sixth Circuit Court of Appeals and each conviction was affirmed. United States v. Garner, 451 F2d 167 (6th Cir 1971).

Petitioner filed a motion to vacate the convictions and sentences imposed under Counts I and II of indictment No. 17,725 on December 26, 1973, pursuant to 28 U.S. Code, §2255. This motion was assigned Civil No. 8488 in the District Court, and raised two issues for relief, i.e., the first contending that Count I of indictment No. 17,725, charging an ex-felon's possession of a firearm, was void upon its face for the reasons set forth by this Honorable Court in United States v. Bass, 404 U.S. 336 (1971); the second contending that the Government failed to prove an essential element, i.e., interstate transportation, of the crime charged in Count II of indictment No. 17,725.

On May 10, 1974 the District Court issued an order (see Appendix p. A-1) granting relief as to Count I and vacating the conviction and sentence had thereunder, but denying all relief as to Count II.

Petitioner thereafter submitted a motion to amend and supplement his original motion on May 28, 1974, wherein he contended that, in addition to the conviction, the sentence imposed under Count II of indictment No. 17, 725 was obtained in violation of this Court's mandate in United States v. Tucker, 404 U.S. 443 (1972). (Use of an invalid prior conviction to enhance punishment).

The District Court, in a Memorandum Opinion filed June 28, 1974 (see Appendix pgs. A-2 through A-4) "summarily denied" petitioner's amended motion (which was treated as a new §2255 motion). A motion

for reconsideration as to the Tucker issue was filed by Petitioner, and on July 17, 1974, all relief was denied (see Appendix p. A-5).

Petitioner appealed the District Court's orders of May 10, 1974, June 28, 1974, and July 17, 1974, to the Sixth Circuit Court of Appeals, and the same were docketed under appeal No. 74-1953.

Prior to submitting his brief on appeal, petitioner's "next of friend" discovered an additional error in the sentencing under Count II of indictment No. 17,725, and submitted a new §2255 motion to the District Court. Said new motion was filed on November 20, 1974 and assigned Civil Action No. 3-74-337 in the District Court.

Petitioner filed a motion with the Sixth Circuit Court of Appeals seeking a "stay" of his appeal, pending a decision by the District Court on his new §2255 motion. However, rather than stay the said appeal, the court below issued its order dated January 8, 1975, remanding the District Court's summary dismissal of petitioner's first §2255 motion (NO. 8488), and ordered the District Court to reconsider its prior decision along with issues raised in the new §2255 motion (No. 3-74-337). (See Appendix pgs. A-6 through A-7). On January 24, 1975, the court below amended its remand order of January 8, 1975, confining reconsideration to the Tucker issue only. (See Appendix p. A-8).

Petitioner's new §2255 motion (No. 3-74-337) presented only one contention, i.e., that his ten (10) year sentence was in excess of the statutory maximum penalty allowed by 18 U.S. Code, §924 (a). The Government filed a response conceding that petitioner's ten (10) year sentence imposed under Count II of indictment No. 17,725 was in excess of the five (5) year maximum authorized by 18 U.S. Code, §924 (a); however, argued that sentence could have been imposed under either subsections (b) or (c) of 18 U.S. Code, §924, which allowed an "enhanced" maximum term of ten (10) years. The District Court issued its order on March 25, 1975 denying relief (see Appendix pgs. A-9 through A-11). Although the District Court could not say with certainty which penalty provisions petitioner presently stands

sentenced under, the court held that the ten (10) year sentence could have been imposed under either §924 (b) or (c) of Title 18, U.S. Code.

Prior to the District Court denying relief in Civil Action No. 3-74-337, your petitioner filed a motion to disqualify The Honorable Judge Taylor in Civil Action No. 8488. However, rather than reconsider the Tucker issue, as mandated by the Sixth Circuit, the District Court filed a "carbon copy" of its order entered in Civil Action No. 3-74-337, under Civil Action No. 8488 (addressing issues not raised in No. 8488) on March 25, 1975 (see Appendix pgs. A-12 through A-14), and summarily dismissed petitioner's motion to disqualify on that same date (see Appendix pgs. A-15 and A-16). Because of the obvious confusion, your petitioner filed a motion for relief from the judgment and orders entered in Civil Action No. 8488 on March 25, 1975, and the same was denied (see Appendix p. A-17).

Your petitioner took independent appeals from the District Court's final decisions in Civil Action Nos. 8488 and 3-74-337, to the Sixth Circuit Court of Appeals. The said appeals were assigned appellate numbers 75-1813 and 75-1814 and were consolidated on appeal upon petitioner's request.

The Sixth Circuit affirmed the District Court's dismissals on July 23, 1976 (see Appendix pgs. A-18 through A-24). However, due to certain misstatements of the facts, petitioner filed a motion for a rehearing and rehearing en banc. By order dated October 20, 1976, the court below denied a rehearing (see Appendix p. A-25).

REASONS FOR GRANTING RELIEF

- I. REVIEW SHOULD BE GRANTED TO INTERPRET THE CONGRESSIONAL INTENT OF, AND REQUIREMENTS FOR SENTENCING UNDER, THE VARIOUS PUNISHMENT PROVISIONS OF THE "GUN CONTROL ACT" OF 1968, TITLE 18, U.S. CODE, §924.

There presently exists a serious departure from historically established principles of constitutional law by the courts below which

requires this court's attention. In a case of first impression the Sixth Circuit Court of Appeals interpreted the congressional intent of 18 U.S. Code, §924 (b) and (c) to provide for "summary enhancement" of punishments, over and above established statutory maximums, without requiring the essential elements of said subsections to be charged in the indictment or otherwise considered by the jury. For this reason and due to the lack of prior judicial clarification and interpretation of the punishment provisions of 18 U.S. Code, §924, it is suggested that a writ of certiorari should issue.

Facts Below:

The principle issue raised in the court below was that your petitioner, who was indicted and convicted of "transporting" firearms and ammunitions in interstate only ^{1/} (see Appendix pgs. A-26 through A-27); in violation of 18 U.S. Code, §922 (g), was sentenced in excess of the statutory five (5) years maximum authorized by 18 U.S. Code, §924 (a). Cf: Mauney v. United States, 454 F2d 273 (6th Cir 1972) (Government concession to §924 (a) as the proper punishment statute). The District Court summarily denied relief reasoning that petitioner "could have been" sentenced under the "enhanced" punishment provisions of either subsection (b) or (c)(2) of §924, 18 U.S. Code; even though he was not charged in his indictment or tried for the additional crimes contained in subsections (b) and (c)(2).

^{1/}. Count II of indictment No. 17, 725 reads in pertinent part as follows:

"The Grand Jury further charges that on or about the 5th day of February, 1970, in the Eastern District of Tennessee, Northern Division, GEORGE FINIS GARNER did willfully and knowingly transport and ship in interstate commerce from the State of Florida to Blount County, Tennessee, firearms and ammunitions, to wit: . . . The said GEORGE FINIS GARNER at that time having previously been convicted in a court of a crime punishable by imprisonment for a term exceeding one year. (Title 18, sections 922 (g) and 924, United States Code.):"

The court below affirmed the District Court's dismissal, holding that §924 (b) and (c) merely creates provisions for "enhancement" of punishment and that the essential elements necessary for a finding of guilt thereunder do not need to be included in the indictment or considered by the jury. ^{2/}

SUFFICIENCY OF INDICTMENTS:

In a number of cases decided by this Honorable Court through the years, it was made abundantly clear that a defendant has a constitutionally protected right "to be informed of the nature and cause of the accusation" made against him. See U.S. Constitution, VI Amendment. To insure such protection, this court established two criteria by which the sufficiency of an indictment is to be measured; one of which is that the indictment contain each and every essential element of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet. See Russell v. United States, 369 U.S. 749; United States v. Debrow, 346 U.S. 374 (1953); Burton v. United States, 202 U.S. 344 (1906).

For this reason it can hardly be argued that a defendant can be either convicted or sentenced for crimes of which he is neither indicted for nor convicted of.

INTENT OF STATUTES INVOLVED:

After reviewing the Legislative History of the "Gun Control Act" of 1968, Pub. L. 90-618, and available case law interpreting certain

^{2/}. "This supposes that such sentence was in conflict with 18 U.S.C.A. §924 (a). However, the Grand Jury did not charge him with violation of §924 (a) but rather charged him with violation of 922 (g) and 924. Section 924 has four subsections, namely: (a)(b)(c) and (d). Appellant was tried under §924 (b), or (c), either of which the trial court held were equally applicable to the case. Each of these sections authorized sentences up to ten years of imprisonment." (See opinion below, Appendix p. A-23).

criminal sections, see Huddleston v. United States, 415 U.S. 814 (1974), and various subsections of the penalty provisions at issue, see United States v. Ramirez, 482 F2d 807 (2nd Cir 1973); United States v. Vigil, 458 F2d 385 (10th Cir 1972), it is made clear that subsection (a) of §924 was intended to prescribe punishment "for violations, including false statements, of any provision of this Chapter." Cf: Huddleston v. United States, supra. Also, see Mauney v. United States, 454 F2d 273 (6th Cir 1972).

Subsections (b) and (c) of §924 create separate and distinct "crimes" involving specific elements to be charged in the indictment and proven before any conviction or sentence may be had or imposed thereunder. Thus, it has been held that said subsections prohibit certain "aggregated crimes", rather than merely providing summary "enhancement" of punishments over and above that prescribed by subsection (a) of §924. See United States v. Sudduth, 457 F2d 1198 (10th Cir 1972); United States v. Ramirez, 482 F2d 807 (2nd Cir 1973).

ESSENTIAL ELEMENTS OF STATUTES INVOLVED:

The statutory language of §924 (a), (b), and (c), as well as the "Section Analysis" of the House Report (Judiciary Committee), H.R. No. 1577, at page 4423, 3 U.S. Cong. & Adm. News, specifically reflects the "essential elements" necessary for conviction and punishment thereunder.

Section 924 (a) ^{3/} provides for a maximum five (5) year penalty for violation of "any" provision contained in Chapter 44, Title 18, U.S. Code. Because subsection (a) does not involve criminal acts, but provides for punishment only, the single prerequisite to sentencing thereunder is a violation of any offense set forth in Chapter 44.

Section 924 (b) ^{4/} provides for an enhanced punishment of ten (10) years for any crime, not necessarily one contained in Chapter 44.

^{3/}. The pertinent parts of §924 are set forth in the "Statutes Involved" section herein at pages 344.

^{4/}. See f.n. 3, supra.

involving the shipping, transportation, or receiving of a firearm or ammunition in interstate or foreign commerce "with intent to commit a felony, or with knowledge or reason to believe that such crime will be committed, with the weapon" or ammunition involved. See H.R. No. 1577, at page 4423, 3 U.S. Cong. & Adm. News. However, for the reasons set forth herein and above, such intent is an essential element of this aggregated crime which necessarily must be charged in the indictment and submitted to the jury before any "enhanced" punishment may be imposed. E.g., see Morissette v. United States, 342 U.S. 246 (1952).

Section 924 (c), (1) and (2) ^{5/}, as amended, specifically creates additional "crimes", United States v. Ramirez, supra, and analogous to Subsection (b), are not confined solely to crimes contained in Chapter 44 of Title 18, U.S. Code. In order for a conviction and enhanced punishment to be had under subsection (c)(1), the "essential element" of "using" a firearm to commit a felony must be alleged in the indictment. For such to be had and imposed under subsection (c)(2), the "essential element" of "carrying" a firearm "unlawfully during the commission of any felony" must be charged and proven. Cf. United States v. Bass, 404 U.S. 336 (1971). Moreover, any punishment imposed under §924 (c) must be imposed "in addition to the punishment provided for the commission of such felony".

INDEFINITE AND UNASCERTAINABLE
PENALTY PROVISIONS USED BELOW:

As stated above, your petitioner was sentenced in excess of the statutory maximum provided for the crime charged, i.e., illegal transportation only, 18 U.S. Code, §922 (g). The indictment does not contain the essential elements necessary for conviction or sentencing under the enhanced penalty provisions of §924 (b) or (c)(2). However, both the District Court and the Sixth Circuit Court of Appeals held that, in light of the evidence, it was believed that the ten (10) year term imposed "could have" been imposed under either subsection (b) or (c)(2) of §924.

^{5/}. See f.n. 3, supra.

Notwithstanding a sentencing court's duty to consider all facts relevant to sentencing, the sentence imposed must be within the statutory maximum prescribed for the acts charged. See Williams v. New York, 337 U.S. 241 (1949). The court cannot lawfully sentence a defendant in excess of the statutory maximum for crimes of which he is not convicted of committing; e.g., Burgette v. Texas, 389 U.S. 109 (1967); United States v. Tucker, 404 U.S. 443 (1972). And where it is clear that a District Court Judge has refused to correct such obvious error, this court has ordered the sentence vacated. See Yates v. United States, 356 U.S. 363 (1958).

While it is true that a sentence imposed in excess of the statutory maximum authorized by law has been held "correctable" without vacation of the same, and by merely reducing the sentence to within the limits of the prescribed punishment provisions, it is submitted that your petitioner's entire sentencing proceedings is lacking in due process of law and is totally void.

Neither the sentencing Judge, the United States Attorney, nor the Sixth Circuit Court of Appeals could say, with certainty, which, if any, of the penalty provisions contained in §924 your petitioner presently stands sentenced under. The courts below coyly reason that the excessive sentence could have been imposed under this or that, but this court has long ago held that a sentence must be free from ambiguity and must clearly reflect the court's intent and purpose. See United States v. Daugherty, 269 U.S. 360 (1926). Only then can it be clear that the sentence was not the product of misapprehension or imposed by mistake. See Harris v. United States, 382 U.S. 162 (1965). As this Court held in Townsend v. Burk, 334 U.S. 736 (1948):

"We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence. . ."

and


". . . it is the careless or design pronouncement of sentence on a foundation so extensively and materially false . . . that renders the proceedings lacking in due process?"

In the instant case the sentencing Judge erroneously sentenced petitioner to ten (10) years in prison for a crime which merely allows for a maximum of five (5) years. For the reasons stated above it is clear that the court could not lawfully sentence petitioner under 18 U.S. Code, §924 (b) or (c) because he was not charged with the criminal acts necessary to support such an enhanced punishment. The court cannot say which penalty provision your petitioner was punished under, and it is most obvious that the aggregated crimes unlawfully considered by the sentencing court seriously and factually influenced the punishment imposed. In light of petitioner's sentence being imposed under such a materially untrue and prejudicial foundation it is submitted that the sentence must be vacated in its entirety and reimposed "in the interest of justice".

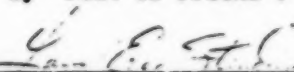
CONCLUSION

For the reasons stated above, and to insure a proper interpretation and application of the congressional intent of 18 U.S. Code, §924 (Gun Control Act of 1968), a writ of certiorari should issue to review the judgments and orders below.

Respectfully submitted,


GEORGE F. GARNER, pro se.
P.O. Box 1000
Marion, Illinois 62959

By "Next Of Friend":


LARRY E. STEAD, Director
Prisoners Legal Assistance Project.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
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MEMORANDUM FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

MICHAEL J. KEANE,
JOHN H. BURNES, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A18-A24)
is reported at 538 F. 2d 128.

JURISDICTION

The judgment of the court of appeals was entered on July 23,
1976. A petition for rehearing was denied on October 20, 1976
(Pet. App. A25). The petition for a writ of certiorari was filed
on December 16, 1976. The jurisdiction of this Court is invoked
under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's sentence on one count of the indictment
exceeded the maximum allowed by statute.

STATEMENT

Following a jury trial on three separate indictments in
the United States District Court for the Eastern District of
Tennessee, petitioner was convicted of transporting firearms and
ammunition in interstate commerce after having been convicted of a
felony, in violation of 18 U.S.C. 922(g) and 924; possessing
unregistered firearms and destructive devices, in violation of
26 U.S.C. 5861(d) and 5871; knowingly retaining stolen United
States postal money orders, in violation of 18 U.S.C. 641; and

possessing, with intent to defraud, falsely made United States postal money orders, in violation of 18 U.S.C. 472. He was sentenced to a total of 20 years' imprisonment.^{1/} His conviction was affirmed on appeal (451 F. 2d 167).

Almost four years later, in November 1974, petitioner filed a motion to vacate his sentence, pursuant to 28 U.S.C. 2255, contending that the ten year sentence of imprisonment imposed on his conviction for transporting firearms in interstate commerce was in excess of the five year maximum authorized by 18 U.S.C. 924(a).^{2/} The district court denied relief, holding that since the evidence adduced at trial showed that petitioner had carried firearms during the commission of a felony, the penalty provisions of either 18 U.S.C. 924(b) (transportation of firearms or ammunition in interstate commerce with intent to commit a felony) or 18 U.S.C. 924(c)(2) (carriage of a firearm during the commission of a felony), both of which authorize a sentence of ten years' imprisonment, were applicable (Pet. App. A9-A11). The court of appeals affirmed (Pet. App. A13-A24).

The undisputed evidence at trial is detailed in the opinion of the court of appeals (Pet. App. A18-A20). In summary, it showed that on February 3, 1970, petitioner unsuccessfully attempted to cash certain United States postal money orders in the First National Bank in Port Joe, Florida. He thereafter left the bank and drove away in an automobile bearing Missouri license plates. Two days later, on February 5, 1970, petitioner was seen driving the automobile bearing the same Missouri license plates

1/ On the first indictment, petitioner was sentenced to two years' imprisonment for possessing a firearm, after having been convicted of a felony (count one) and ten years' imprisonment for transporting firearms and ammunition in interstate commerce (count two), the sentences to run consecutively. (The district court, on collateral attack, subsequently set aside the conviction on count one (Pet. App. A-1)). On the second indictment, charging possession of unregistered firearms, petitioner was sentenced to eight years' imprisonment, to run consecutively to the above sentences. On the third indictment, charging the postal money order offenses, petitioner was sentenced to ten years' imprisonment on each of two counts, to run concurrently with each other and with the sentences imposed on the counts of the first indictment. Petitioner's present challenge involves only the sentence imposed on count two of the first indictment, charging a violation of 18 U.S.C. 922(g) and 924.

2/ On direct appeal, petitioner did not attack the sufficiency of the indictments or question the propriety of the sentences. His sole (continued)

at an excessive rate of speed in the State of Tennessee and was pursued by a Tennessee State Trooper. Following a high speed chase, petitioner crashed the car into a police cruiser that had been set up as part of a road block and was arrested.

In a briefcase in the trunk of petitioner's wrecked car, the police discovered \$38,000 worth of money orders that had been stolen in three separate burglaries of post offices in Missouri, Kentucky, and Tennessee. In each of these burglaries, the safes containing the money orders had been blown open with explosives. In addition to the stolen money orders, the police found an arsenal of guns, ammunition, blasting gelatin, blasting caps and fuses in the trunk of the car.

DISCUSSION

Petitioner contends that the district court erred in sentencing him to a term of imprisonment that exceeded the statutory maximum for the offenses with which he was charged. Count two of the first indictment alleged in pertinent part (Pet. App. A26-A27):

[O]n or about the 5th day of February, 1970, in the Eastern District of Tennessee, Northern Division, GEORGE FINIS GARNER did willfully and knowingly transport and ship in interstate commerce from the State of Florida to Blount County, Tennessee, firearms and ammunition, * * * the same George Finis Garner at that time having previously been convicted of a crime punishable by imprisonment for a term exceeding one year. (Title 18, Sections 922(g) and 924, United States Code.)

Although 18 U.S.C. 924(a) provides that the maximum penalty for a violation of Section 922(g) is five years' imprisonment, the district court sentenced petitioner to ten years in prison on this count. When this discrepancy was raised in petitioner's motion

2/ (continued) contention related to the search of his car and seizure of the contraband following his arrest (451 F. 2d 167, 169). Petitioner's first collateral attack on his conviction was filed on December 26, 1973, when he moved to vacate both convictions under the first indictment, alleging that count one failed to charge an interstate nexus and that the government had not proven an interstate nexus in count two. The district court granted his motion as to count one but denied it as to count two (the court challenged here), and petitioner appealed. On January 8, 1975, the court of appeals vacated the judgment of the district court as to the conviction under count two and remanded the cause for consideration in light of petitioner's second Section 2255 motion, filed on November 24, 1974, which contended that the sentence on count two was invalid because it exceeded the maximum period authorized by statute.

to vacate his sentence, the court observed that "it did not err in sentencing petitioner to ten years under Count II because the penalty provisions of Section 924(b) or (c)(2) were clearly applicable to this case" (Pet. App. A10). The court of appeals agreed, stating (*id.* at A23-A24):

If Count Two of the indictment had indicated that [petitioner] was charged under Title 18 U.S.C.A. § 924(b) or (c)(2), instead of simply under 18 U.S.C.A. § 924, there would be no basis for argument as to the illegality of sentencing. However, as heretofore stated, the Government contended and its proofs showed that [petitioner] had committed the offense under § 924(b) or (c)(2). As the District Court remarked, [petitioner] was represented by counsel who were able and experienced in the trial of criminal cases, and no objection was raised as to the applicable penalty provisions before trial, during trial, or at sentencing. The mere fact that the Grand Jury charged [petitioner] in the indictment with violation of Title 18 U.S.C.A. § 924, instead of § 924(b) does not invalidate the sentence under the latter provision of § 924, where the evidence was introduced by the Government in support of the charge under this count, and no objection was made during the trial to evidence in support of such count, nor any objection at the time of sentencing thereunder.

Although the decisions of the courts below on petitioner's Section 2255 motion substantially reflected arguments that had been presented by the government, we have concluded after further consideration that petitioner's sentence on count two of the first indictment must be set aside and that he must be resentenced to no more than five years' imprisonment on that count. The district court and the court of appeals incorrectly assumed that the only defect in these proceedings was the statement in the indictment that petitioner had been charged with violating 18 U.S.C. 924 rather than specifying subsections (b) or (c)(2) of Section 924. We would agree that, under such circumstances, any lack of specificity in the citation in the indictment would not entitle petitioner to relief on collateral attack, at least in the absence of a clear showing of prejudice. See Fed. R. Crim. P. 7(c)(3).

We believe, however, that the error in this case was more fundamental. 18 U.S.C. 924(b) and (c)(2) are separate offenses rather than enhanced punishment provisions, and the elements of

those crimes must be charged in the indictment before convictions thereunder may be obtained. Cf. United States v. Howard, 504 F. 2d 1281, 1286 (C.A. 8); United States v. Ramirez, 482 F. 2d 807, 813 (C.A. 2), certiorari denied, 414 U.S. 1070; United States v. Vigil, 458 F. 2d 385, 386 (C.A. 10). The count in question charged petitioner neither with transporting firearms and ammunition in interstate commerce with intent to commit a felony (18 U.S.C. 924(b)) nor with transporting those materials during the commission of a felony (18 U.S.C. 924(c)(2)). The count simply made no mention of any felony related to the transportation of the firearms, as we believe it must have done in order to charge an offense under Section 924(b) or 924(c)(2). Thus, while the evidence plainly showed that petitioner in fact committed those crimes, he could not have been convicted of or sentenced for either offense because he was not indicted for them.

Count two charged petitioner with transporting arms and ammunition in interstate commerce after having been convicted of a felony, in violation of 18 U.S.C. 922(g). As previously noted, the maximum penalty for that offense is five years' imprisonment. See Mauney v. United States, 454 F. 2d 273, 274 (C.A. 6). Accordingly, we do not oppose a grant of the petition for the purpose of reversing the judgment of the court of appeals and remanding the case to the district court with instructions to correct the sentence on that count.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

MICHAEL J. KEANE,
JOHN H. BURNES, JR.,
Attorneys.

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